HIZRAN ENTERPRISE & ANOR.

v.

KUMPULAN SUA BETONG SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
DATUK HAJI MOKHTAR BIN HAJI SIDIN J.
[CIVIL SUIT NO. F69-83]
25 JUNE 1994

CONTRACT: Agreement for sale and purchase of land - Defendant refusing to go through with sale - Plaintiffs applying for order for specific performance - Whether sale and purchase agreement null and void - Whether agreement contrary to s. 214A National Land Code - Whether representative of defendant who negotiated sale had authority to do so - Whether there was any conflict of interest on the part of the representative of defendant who negotiated sale - First plaintiff assigning its interests to the second plaintiff - Whether amounted to a breach of the terms of the agreement - Whether there was evidence of mala fides on the part of the plaintiffs - Whether plaintiffs ready and willing to perform their part of the obligations - Whether plaintiffs entitled to remedy of specific performance.

The first plaintiff entered into an agreement for the purchase of a portion of a piece of land (the said land) from the defendant. After the issuance of separate titles for the portion of the said land, the first plaintiff sent a cheque for the balance of the purchase price to the defendant. The defendant returned the cheque, refused to carry on with the sale and terminated the agreement. The plaintiffs sued for specific performance of the agreement.

The defendant alleged that the agreement was illegal, unlawful, void and unenforceable because:

(a) the agreement is contrary to s. 214A of the National Land Code 1965 (NLC 1965);
(b) the representative of the defendant who negotiated to sell the land lacked the authority to deal with the said land; and
(c) there was a conflict of interest on the part of the person who negotiated to sell the land on behalf of the defendant.

The defendant further contended that the plaintiffs are not entitled to specific performance of the agreement as the first plaintiff had acted in breach of the terms of the agreement by assigning its interest to the second plaintiff, there was lack of good faith on the transaction and the plaintiffs lack of willingness and readiness to perform their part of the obligations.

Held:

[1] The question whether the agreement is contrary to s. 214A NLC 1965 has already been decided by the Supreme Court in the case of *Kumpulan Sua Betong v. Ezan Sdn. Bhd. & Anor.* which decided that a transfer to a person which includes a firm was not caught by s. 214A NLC 1965. As the defendant had agreed to sell the land to the first plaintiff, which is a firm, the transaction was not contrary to the provisions of s. 214A.

[2] In any event applying the provisions of s. 136(1) NLC 1965, when the sub-divisions were approved and separate titles issued by the proper authority, it is deemed that all the requirements and conditions under the National Land Code had been complied with and this includes the approval of the Estate Land Board in respect of estate land.

[3] It was clear from the evidence that the people involved in the negotiations for the sale and the execution of the sale and purchase agreement were people having the authority to deal with the land on behalf of the defendant or the defendant's parent company. In the circumstances there were no merits to the defendant's contention that its representative lacked the authority to deal with the sale of the said land.

[4] Though the defendant had succeeded in establishing that one of the partners of the first plaintff was the brother-in-law of the person who negotiated the sale on behalf of the defendant, it had failed to establish that there was any influence by the partner in the sale to the first plaintiff. It would appear that the partner was just lending his name as a bumiputra so as to enable the first plaintiff to purchase the portion of the said land from the defendant. This in itself was not sufficient to declare the sale and purchase agreement null and void and there were no merits in the defendant's argument on this point.

[5] There was nothing in the sale and purchase agreement which prohibited the first plaintiff from assigning its purchase to the second plaintiff and the defendant's contention that this was a breach of the agreement was without foundation. Similarly, there was no evidence of lack of

good faith on the part of the first plaintiff as alleged by the defendant. In fact the evidence clearly showed that the lack of good faith was on the part of the plaintiff in refusing to honour the agreement.

[6] From the evidence it was quite clear that the first plaintiff was ever willing and ready to perform its obligations whereas it was the defendant who was not willing and ready to perform when it returned the cheque for the balance of the purchase price and gave notice to terminate the agreement to the first plaintiff.

[7] In the circumstances, it is inequitable for the defendant to benefit from its own default in refusing to honour the sale and purchase agreement and the plaintiffs should be granted specific performance of the agreement. Since the portion of the land had appreciated in value and in any event since the plaintiffs had not adduced any evidence that they had suffered damages, they are not entitled to claim for damages.

[Plaintiffs' claim allowed with costs. Specific performance of the sale and purchase agreement ordered].

Case referred to:
Kumpulan Sua Betong Sdn. Bhd. v. Ezan Sdn. Bhd. & Anor. [1993] 2 SCR 152 ***(foll)***

Legislation referred to:
Companies Act 1965, ss. 132C, 132E
National Land Code 1965, ss. 136(1), 214A
Registration of Business Act 1956

For the plaintiff - R. R. Sethu; M/s. R. R. Sethu & Co.
For the defendant - Hj. Sulaiman Abdullah; M/s. Zain & Co.

JUDGMENT

Haji Mokhtar Bin Haji Sidin J:
The plaintiffs claimed against the defendant an order for specific performance for the transfer of a portion of a piece of land held under C.T. No. 12407 Lot No. 2002 in the Mukim of Port Dickson to the second plaintiff or his nominee and/or damages for breach of contract.

In this case the plaintiff is a firm registered under the Registration of Business Act 1956. It is common ground that the first plaintiff was formed shortly before the execution of the sale and purchase agreement to purchase the portion of a piece of land held under C.T. No. 12407 Lot 2002 in the Mukim of Port Dickson (hereinafter referred to as "the said land") and it was formed for the sole purpose of purchasing the portion of the said land. The reason for the formation of the first plaintiff according to SP1 was that the defendant would not sell the land except to a bumiputera or a bumiputera firm as required by the state authority. Whether this is true is not my concern but no concrete evidence had been given. One of the partners in the first plaintiff's firm is SP1 (Yogeswaran a/l A.S. Thambaiya). SP1 in his evidence stated that he got the information for the sale and the conditions for the sale from one Dato' Abdul Razak bin Hashim who was one of the directors of the defendant. It was on the suggestion of the said Dato' Abdul Razak that the first plaintiff was formed by SP1 in partnership with one Syed Hizam who happened to be the brother-in-law of the said Dato' Abdul Razak. The said land consisted of approximately 322 acres which form part of the defendant's estate known as Lukut Estate. By an agreement dated 16 May 1980 the first plaintiff agreed to buy and the defendant agreed to sell a portion of the said land measuring an area of 135.5 acres approximately for the sum of RM813,000. SP1 was the one who negotiated the purchase from the defendant. The first plaintiff paid the deposit which was accepted by the defendant. Subsequently after the issuance of separate titles for that portion of the said land by the relevant authority the first plaintiff sent a cheque for the balance of the purchase price to the defendant. The defendant returned the cheque to the plaintiff stating that it refused to carry on with the sale and terminated the agreement. The plaintiff never cashed the cheque and it was produced as an exhibit.

It is to be noted that the sale and purchase agreement was signed by one Mr. B.G. Lewis, the administrative director of Guthrie (defendant's parent company) on behalf of the defendant. There is evidence to show that he and Dato' Abdul Razak negotiated for the sale on behalf of the defendant. It was agreed between the first plaintiff and the defendant that the portion of the said land sold be sub-divided into smaller lots. SP1 stated that at first he wanted to sub-divide the land into lots of three acres each but subsequently changed his mind to sub-divide it into lots of one acre each. To this the defendant agreed. For that purpose the

defendant appointed a surveyor to sub-divide the portion of the said land. There is no dispute that the portion of the said land was eventually sub-divided and separate titles were issued and that SP1 collected the separate titles totalling 111 in all from the Land Office, Port Dickson. Of the said 111 titles, 110 are lots of one acre each and one title comprising the balance of the land sold to the first plaintiff. SP1 gave evidence in Court that he went to collect the separate titles when the surveyor who submitted the application for sub-division to the Land Office authorised him to do so since it had been agreed earlier between himself and the defendant that SP1 was to collect the separate titles. Though the defendant questioned the right of SP1 to collect the separate titles no evidence was adduced to show that the defendant did not agree to this arrangement. It is not disputed that the surveyor who did the sub-divisions and submitted the application for sub-division to the Land Office was authorised by the defendant and did it on behalf of the defendant.

When the defendant returned the cheque to the first plaintiff and gave notice to terminate the agreement the first plaintiff refused to accept the termination. The first plaintiff and the second plaintiff then instituted the present action against the defendant for specific performance and/or for damages. It is common ground that the defendant had also terminated several other agreements with other parties in respect of the sale of other portions of the land. The various purchasers have taken Court actions against the defendant. Most of them are still pending except for one case which had been decided in the Supreme Court and that is the case of *Kumpulan Sua Betong Sdn. Bhd. v. Ezan Sdn. Bhd. and Another* [1993] 2 SCR 152.

In its defence and counterclaim the defendant claimed that the sale and purchase agreement is null and void. It was contended by the defendant that the agreement was illegal, unlawful, void and unenforceable. It was also contended by the defendant that the plaintiffs are not entitled to specific performance in the present action mainly on three grounds, *viz-a-viz* that there was breach on the part of the plaintiffs of the said agreement, their lack of good faith on the transaction and their lack of willingness and readiness to perform their part of the obligations.

(1) Whether the agreement is illegal, unlawful, void and unenforceable:

The defendant contended that the agreement was illegal, unlawful, void and unenforceable for the following reasons:

(a) the agreement is contrary to s. 214A of the National Land Code;
(b) the representative of the defendant who negotiated to sell the land lacked the authority to deal with the said land; and
(c) there was a conflict of interest on the part of the person who negotiated to sell the land on behalf of the defendant.

(a) Agreement is contrary to s. 214A of the National Land Code:

There is no necessity for me to go into depth in respect of this ground since there is already a decision of the Supreme Court in the case of *Kumpulan Sua Betong v. Ezan Sdn. Bhd. (No. 2)* [1993] 2 SCR 152. The facts in that case are somewhat similar if not identical to the present one. In that case though the land sold was not sub-divided into smaller lots it was transferred and registered without the approval of the Estate Land Board. The Supreme Court held that the transfer was valid on the ground that it was sold to a person which is a firm. Since the transfer was to a person the sale is not caught by s. 214A of the National Land Code. The situation is the same in the present case and that is sufficient to dispose off that point since the defendant had already agreed to sell the land to the first plaintiff which is a firm.

Anyway, permit me to say a bit more in respect of the present case. The land in the present case had already been sub-divided on the request of the defendant and the whole sub-division lots were to be transferred to the first plaintiff or the second plaintiff. When the separate titles were issued the condition for the usage of the land was left blank indicating that the usage of the land had been changed from rubber trees to any use indicating it used to be a rubber estate land. Further, I am of the view that when the relevant authority approved the sub-divisions it is deemed that the Estate Land Board had given its approval by virtue of s. 136(1) of the National Land Code where it states:

136(1) No sub-division shall be approved by the State Director or, as the case may be, lands

administrator unless the following conditions are satisfied -

(a) that the sub-division would not contravene any restriction in interest to which the land is for the time being subject to;
(b) that **the sub-division would not be contrary to the provisions of any written law for the time being in force, and that any requirements thereto by or under any such law have been complied with;**
(Emphasis is mine).

From this it appears to me that when the sub-divisions were approved and separate titles had been issued by the proper authority it is deemed that all the requirements and conditions under the National Land Code had been complied with and this includes the approval of Estate Land Board in respect of estate land.

Though the defendant argued that no application was ever made by anyone to the Estate Land Board for the sale, the defendant did not dispute the sub-division had been completed which means that requirements under s. 136(1) had been complied with. The defendant knew the sub-divisions had been completed but the defendant did not make any attempt to revoke the sub-divisions and reimpose the condition of the usage on the said land.

From the evidence given during the trial it is clear to me that the defendant had decided to sell the land long before the sale and purchase agreement between the first plaintiff and the defendant. The State Government had already gazetted to acquire the land from the defendant. The defendant's representatives went to see the state authority and it was agreed between the parties that instead of the state acquiring the land the defendant should sell the land to bumiputera companies or concerns approved by the state authority. As such when the state authority gazetted the notice to acquire, the rubber trees in the portion to be acquired were left unattended and the workers were moved to other parts of the estate. This was confirmed by the witness for the defendant (SD4). On that basis the defendant then negotiated to sell the land to various firms and companies including the first plaintiff and if I am not mistaken to sell the said land at the best available price or face the consequences of the land being acquired by the state.

Taking into consideration the total scenario, the defendant then sold the land to various companies and firms. In my view the best way to sell the land was portion by portion to an individual, a firm or a company so that it would not be caught by s. 214A of the National Land Code.

(b) The representative of the defendant who disposed off the land lacks the authority to deal with the said land:

It was contended by the defendant that Dato' Abdul Razak was the one who negotiated for the sale and when he negotiated to sell the land he had no authority to do so. The defendant submitted that from the minute book of the defendant and its parent company for the period from 1978 to date, no approval was given by the Board of Directors of the defendant or Guthrie (the parent company) for the said land to be sold. SD3 who gave evidence in respect of this admitted that she did not attend all the meetings of the Board of Directors of both companies and her evidence is based on the reading of the minute book. As such she could not really tell what actually transpired at those meetings. On the other hand SD4 who was the public relations director admitted that the Board of Directors of the defendant and Guthrie had agreed to sell the land to various companies and firms including the first plaintiff. SD3 in her evidence stated that Dato' Abdul Razak at the material time was a Director of Guthrie and was appointed the Chief Executive of the defendant's company. As the Chief Executive of the defendant, Dato' Abdul Razak was directly involved in the administration of the defendant including sale and purchase. From the evidence of SD4 it is clear to me that it was Dato' Abdul Razak and SD4 who negotiated with the state authority to stop the acquisition. It is also clear to me that the sale and purchase agreement in the present case was signed on behalf of the defendant by one Mr. B.G. Lewis who was a director of Guthrie.

From the above it is clear to me that the people involved in the negotiations for the sale and the execution of the sale and purchase agreement were people having the authority to deal with the land on behalf of the defendant or Guthrie and Dato' Abdul Razak was not the only person who negotiated for the sale of the said land on behalf of the defendant. As such I see no merit in the contention of the defendant on this point.

(c) Conflict of interest on the part of Dato' Abdul Razak in the disposal of the said land:

It was also contended by the defendant that Dato' Abdul Razak being a director of the company at the time when he negotiated to sell the land to the first plaintiff was also the brother-in-law of Syed Hizam (SD1), a partner of the first plaintiff. It was submitted that that being the case there was a conflict of interest on the part of Dato' Abdul Razak and as such it offended ss. 132C and 132E of the Companies Act which prohibit a transaction by a person in a fiduciary position. It is clear to me that these two provisions were introduced into the Companies Act 1965 by way of amendments and they came into force long after (several years) the sale and purchase agreement between the first plaintiff and the defendant had been executed. There is nothing to indicate that these two sections had retrospective effect. In view of that I am of the opinion that the sale and purchase agreement is not affected by these provisions.

Though the defendant had succeeded in establishing that Syed Hizam is the brother-in-law of Dato' Abdul Razak the defendant failed to establish that Syed Hizam had influenced the said Dato' Abdul Razak in the sale to the first plaintiff. It is clear from the evidence which has not been challenged that the negotiations for the sale throughout were between Mr. Yogeswaran (SP1) and Dato' Abdul Razak. There is clear evidence to show that Syed Hizam (SD1) never took part in the negotiations for the purchase of the portion of the said land as what he had stated was that he was involved in another purchase. As a witness for the defendant, the defendant did not adduce any evidence that Syed Hizam took part in the negotiations or that he influenced Dato' Abdul Razak to sell the land to the first plaintiff. The only evidence adduced is that he was the brother-in-law of Dato' Abdul Razak. SD1 stated that he was invited into the partnership by SP1 to form the first plaintiff in order for it to acquire the status of a bumiputera firm. He agreed to do so and that is all. SD1 admitted that he was not involved in the transaction between the first plaintiff and the defendant since he himself was involved in another transaction between himself and the defendant. It appears to me that SD1 was just lending his name as a bumiputera to the first plaintiff so as to enable the first plaintiff to purchase the portion of the said land from the defendant. In my view that is not sufficient to declare the sale and purchase agreement as null and void.

Further it is clear to me that the said Dato' Abdul Razak only negotiated for the sale of the land but the final say was with the defendant or Guthrie. Thus when the sale and purchase agreement was executed by Mr. B.G. Lewis on behalf of the defendant it is clear to me that the defendant had confirmed the negotiations done by Dato' Abdul Razak and accepted the sale. As such I see no merit in the arguments of the defendant on this point.

(2) *Breach by the first plaintiff:*

It was contended by the defendant that the plaintiffs are not entitled to specific performance in the present case because:

(a) there was a breach on the part of the plaintiffs;
(b) there was a lack of good faith on the part of the plaintiffs in respect of the transaction; and
(c) lack of willingness and readiness on the part of the plaintiffs to perform their obligations.

It was submitted by the defendant that the assignment by the first plaintiff to the second plaintiff was tantamount to a breach of the sale and purchase agreement by the first plaintiff. It was submitted that when the first plaintiff assigned the purchase to the second plaintiff it was done without the consent or approval of the defendant. I have gone through the sale and purchase agreement and there is nothing in that agreement which prohibits such assignment. It was also submitted by the defendant that the effect of the assignment was to transfer the land to a non-bumiputera and thus it went against the condition imposed. I could not find any such condition in the sale and purchase agreement. The only evidence in respect of this was the evidence of SP1, SD1 and SD4. The defendant had not established before me that such condition was imposed by the state authority. The burden is on the defendant to establish that such condition had been imposed by the state authority. This the defendant had failed to establish.

Though it was contended by the defendant that there was lack of good faith on the part of the first plaintiff in respect of this transaction, no

evidence was adduced by the defendant. From the evidence it is clear to me that the first plaintiff wanted to purchase the land and for that it entered into a sale and purchase agreement with the defendant. The first plaintiff paid the deposit and it was agreed between the parties that the balance of the purchase money was to be paid on the issuance of separate titles. The first plaintiff paid the balance of the purchase money on the issuance of the separate titles which was rejected by the defendant. I could not find any lack of good faith on the part of the first plaintiff.

The defendant went to great lengths to establish a scheme by SP1 of what to do with the portion of the said land after the purchase. In my view what the first plaintiff wanted to do with the portion of the said land after it had purchased it is not the concern of this Court unless it could be shown that the scheme is against the law. From the evidence it is clear to me that the lack of good faith was on the part of the defendant who refused to honour the agreement.

As to the issue on the lack of willingness and readiness on the part of the first plaintiff to perform it is clear to me from the evidence that the first plaintiff was ever willing and ready to perform its obligations. It was the defendant who was not willing and ready to perform when it returned the cheque for the balance of the purchase money and gave notice to terminate the sale and purchase agreement to the first plaintiff. It was submitted that the first plaintiff did not make any application to the Estate Land Board for the purchase. It is clear to me that under the law both parties must submit the application. When the defendant refused to honour the agreement there is no way the first plaintiff could submit the application on its own. The defendant could not now turn around and submit that the first plaintiff had failed to meet its obligations.

(3) *Other issues:*

It was submitted by the defendant that the defendant can no longer be compelled to complete the said agreement in view of the considerable delay and that it would be unreasonable and inequitable to expect the defendant to complete the said agreement. In my view it is inequitable for the defendant to benefit from its own default in refusing to honour the sale and purchase agreement. All the time the first plaintiff was willing to meet all the obligations and on the other hand the defendant was trying to find ways and means to terminate the agreement. From the evidence it is clear to me that the way is all clear for the performance in the transfer where the separate titles had been issued.

The defendant also raised the issue that SP1 has no authority to collect the separate titles from the Land Office. In my view this is not an issue in the present case. Whether SP1 had the authority to collect the separate titles from the Land Office or not is a separate issue entirely. The defendant did not complain about it until the matter came to Court, but from the evidence there is implied approval by the defendant for SP1 to collect them when the surveyor who was employed by the defendant to do the sub-divisions gave a letter of authority for SP1 to collect the titles from the Land Office.

In view of the above I find that the plaintiffs should be given the prayer for specific performance henceforth. Since the portion of the land had appreciated in value, I am of the view that the plaintiffs are not entitled to the claim for damages. The plaintiffs had not adduced any evidence that they had suffered damages. Costs to the plaintiffs to be paid by the defendant.